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STATE PASS TO USTR FOR JENNIFER CHOE GROVES

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SUBJECT: 2008 SPECIAL 301 REVIEW - COSTA RICA

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SUMMARY
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¶1. Since last year's report (Ref C), the GOCR has made some progress in advancing laws related to Intellectual Property Rights (IPR) required by the Central American Free Trade Agreement (CAFTA-DR). However, Costa Rica must still take several major steps to adequately protect and enforce IPR, beginning with enacting the necessary IPR laws and regulations to meet its CAFTA-DR obligations. In addition, Costa Rica has not demonstrated a concerted resolve to enforce its current IPR laws. Instead, the country's Attorney General has publicly and repeatedly stated that Costa Rica should use its limited investigative and prosecutorial resources to pursue violent and drug-related crimes. Nonetheless, there has been some progress. The Costa Rican office that issues patents has recently ended a lengthy pause in examining patent applications. A number of Costa Rican officials have received training in IPR enforcement, administration, prosecution, and customs from USPTO, DHS, WIPO, and others. Due to these slight improvements, as well as to the understanding that the GOCR will address the additional shortcomings in Costa Rica's laws and regulations this year, Post recommends that Costa Rica remain on the Watch List.

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IPR BACKGROUND IN COSTA RICA
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¶2. Issues related to IPR rose to the forefront of Costa Rica's public debate during the campaign leading up to the October 7, 2007 nationwide referendum to ratify the country's participation in CAFTA-DR. This was the first referendum in Costa Rica's history and generated enormous national interest in all of the issues associated with CAFTA-DR, including IPR. Those opposed to CAFTA-DR routinely spoke out against the agreement's requirements to create effective deterrents against IPR infringement as well as protections for IPR, politicizing the issues. Opposition leaders asserted that increased penalties for IPR violators would "send students to jail for copying textbooks" and increased IPR protection would bankrupt the local social security system that would be forced to purchase original, innovative pharmaceuticals rather than generics. The Costa Rican public ultimately rejected such arguments and approved CAFTA-DR by a slim margin, but the negative campaign created an environment where issues

related to IPR remained controversial.

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AIMING FOR TRIPS COMPLIANCE THROUGH A LEGISLATIVE AGENDA

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13. After Costa Rica was included in the Priority Watch List in 2001, the country took the necessary steps to bring into force the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT) on March 6, 2002 and May 20, 2002, respectively. Costa Rica has also ratified the Patent Cooperation Treaty (PCT). Nevertheless, the country remained non-compliant with several TRIPS measures, such as data protection and deterrent measures. These deficiencies are addressed in CAFTA-DR, which the country signed in 2004, but has not yet implemented and entered-into-force.

14. Since last year's Special 301 Report, Costa Rica has made some progress in enacting needed legislative reforms to become compliant with CAFTA-DR obligations related to IPR. The legislature is working on four bills and the ratification of two treaties that deal with IPR. When these bills are enacted and the treaties ratified, Costa Rica should be compliant with TRIPS. Since the opponents of increased IPR protection attempted to water-down the IPR bills through the introduction of hundreds of amendments, the progress of bills has been very slow. Nevertheless, the GOCR is energetically directing the legislative process and is confident that the laws, when finally enacted, will meet the country's CAFTA-DR obligations. To date, the legislature has approved one of the four IPR-related laws (on trademarks) and both of the treaties (Budapest and UPOV). Supreme Court review and further legislative action remain to be completed, however.

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BUT SADDLED BY ENFORCEMENT PROBLEMS

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15. Despite these legislative victories, real challenges remain in effectively ensuring that the laws have an impact on the local IPR environment. Throughout 2007, Costa Rica continued to falter in enforcing its current IPR laws. While the country's current laws do not provide for significant prison time or monetary damages for IPR violators, they do criminalize counterfeiting and piracy. Nevertheless, the country's public prosecutors have consistently demurred from prosecuting IPR cases. The prosecution of IPR crimes is handled by public prosecutors in the "various crimes" divisions of the branch offices of the Attorney General's office. Crimes related to IPR, however, form only a small portion of the portfolio of these prosecutors and receive little or no attention. Rather, the prosecutors invoke "opportunity criteria" (akin to prosecutorial discretion) to avoid opening an investigation into reported IPR crimes.

16. In late 2007, the Attorney General of Costa Rica, Francisco Dall'anese, publicly reiterated that he does not support diverting limited resources to the prosecution of IPR crimes. Rather, he maintains that private companies can seek redress in civil courts or can initiate a criminal public action through private application. By this process, a private party (almost always through an attorney) files a complaint and jointly conducts the investigation and prosecution of the case with the public prosecutor. While this could be an effective means of prosecuting IPR violators, the reality is that prosecutors continue to avoid handling IPR cases by invoking opportunity criteria. When that occurs, private attorneys do not have the standing to petition for the seizure of counterfeit goods. Likewise, the use of the civil courts to pursue private cases against IPR violators is hampered by the extreme length of time it takes to receive a civil judgment (up to 15 years) and the small monetary damages awarded.

17. Industry and others have asked Dall'anese to halt the

nearly automatic use of opportunity criteria with IPR crimes, but he has rebuffed their calls. The position of Attorney General in Costa Rica is entirely independent of the Costa Rican Executive and Legislative Branches. Constitutionally, the position falls under the Judiciary, but, in practice, it is almost completely autonomous. Dall'anese was unexpectedly reelected to another four year term as Attorney General in late 2007.

18. The few prosecutions that have wound their way through the criminal court system over the last two years were originally started several years ago. In February 2008, industry successfully concluded a prosecution against a counterfeiter of apparel. As has been the case in previous successful prosecutions of IPR violators, the judge immediately paroled the convicted counterfeiter as it was her first offense and the sentence was for less than three years. (COMMENT: No matter the crime, judges in Costa Rica have the latitude to immediately parole first-offenders who have been sentenced to less than three years of prison. Judges generally use this power in all criminal cases when it can be applied. END COMMENT.)

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AT THE BORDER: ARE THE GOODS GENUINE?

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19. Costa Rica's Customs service continues to face difficulties in halting the flow of counterfeit goods into the country. The leadership of Customs is aware of the importance of seizing pirated goods, but most customs agents lack the necessary training to recognize counterfeits. In April 2007, the U.S. Embassy took advantage of a regional program offered by DHS to send a number of Costa Rican officials for training in recognizing counterfeits. Local industry has also expressed an interest in providing counterfeit recognition training to Customs officials.

110. In addition, the laws regulating the filing of criminal cases can impede the seizure of pirated goods at the border. If a customs agent recognizes that a shipment contains pirated goods, the agent can order the shipment seized for 48 hours. If, at the end of that period, the holder of the IPR has not filed a criminal complaint against the importer, the customs agent must either release the goods or file a criminal complaint, which can open the agent up to personal liability through a countersuit by the importer if the criminal complaint is ultimately unsuccessful. Increased communication between Customs and industry would help solve this problem by providing time for the owner of the trademark or patent to file the police report. In such cases, even if the prosecutor ultimately invokes opportunity criteria and abandons his/her role in the criminal prosecution, the private party could continue the action, aided by the fact that the goods have already been seized by Customs.

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COSTA RICAN PATENT OFFICE: CAPACITY BY CONTRACT

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111. Throughout most of 2007, the Costa Rican Industrial Property (IP) Office continued to experience severe delays in processing patent applications. Patent attorneys in Costa Rica relate that the office has not yet begun processing patent cases first submitted in 2004 and 2005. Currently, the IP Office does not have any in-house patent examiners. Instead, the office relies on a contract relationship with the Costa Rican Technical Institute and the Pharmacists Board Association to provide technical experts to serve as examiners. The IP Office has been formalizing this arrangement for at least two years. It previously contracted with the University of Costa Rica's PROINNOVA office to conduct patent examinations. That entity, however, never began concerted work in examining patents, and its relationship with the IP Office terminated in late 2006.

¶12. This "out-sourcing" arrangement has only just begun to result in examined applications, with the examiners affiliated with the Pharmacists Board completing the first 20 pharmaceutical examinations in December 2007. The IP Office will likely use these outside examiners to move through the enormous backlog of thousands of patent applications that have accumulated over the last several years (during which virtually no applications were examined). Additionally, the IP Office intends to hire its own in-house experts to better oversee the work of the outside examiners.

¶13. The World Intellectual Property Organization (WIPO) has worked closely with the Costa Rican IP Office to train employees. WIPO has also started to offer training to officials in the judiciary that have an interest in IPR. In addition, the U.S. Embassy has sent several Costa Rican officials to the USPTO's Global Intellectual Property Academy for training.

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USE/PROCUREMENT OF GOVERNMENT SOFTWARE
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¶14. The 2002 Executive Decree #30, 151-J, mandated that all government ministries use only legally licensed computer software. According to this decree, each ministry was to conduct an internal audit and submit a statement of compliance no later than July 31, 2003. The government subsequently claimed full certification of all ministries, although there had been no independent confirmation.

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COMMENT
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¶15. In general, Costa Rica does not yet view IPR as a tool to spur innovation. The measures underway in the legislature are more the result of outside pressure, than of a home-grown realization that increased IPR protections can spark innovation which can fuel greater high-tech economic development. However, the GOCR's incremental improvements to the IPR protection and enforcement regime are a positive sign. The GOCR must further advance by finalizing the related IPR bills and corresponding regulations so that the country will be compliant with its CAFTA-DR obligations. Post believes that the GOCR will ultimately complete all the CAFTA-DR required implementing legislation and regulations in 2008. Therefore, based on the GOCR's progress to date (albeit limited) in improving the country's IPR regime, Post recommends that Costa Rica remain on the Watch List. This is the properly-modulated message, in our view. To lower Costa Rica's standing at precisely the time the GOCR is (finally) completing its CAFTA-DR implementation obligations would be too harsh a signal that might risk stalling the current CAFTA-DR momentum. Such a move might also be viewed as provocative by the Arias administration, and especially by the Attorney General. This would be counterproductive to our low-key but steady efforts to work with the GOCR to improve IPR protection.

BRENNAN